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SUPREME COURT, U.S.

NO. 79-6601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUTUES WHITE, Petitioner,

-vs-

FRED FINKBEINER, Respondent.

ORIGINAL COPY

FOR RESPONDENT

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statement in Miranda v. Arizona, 384 U.S. 436, 474 (1966), that "(i)f the individual states that he wants an attorney, the interrogation must cease until an attorney is present" creates a per se rule prohibiting the waiver of a previous request for counsel?

2. Whether full Miranda warnings, a signed waiver of those rights, and the statement that "I don't need a lawyer" are sufficient factors to constitute a knowing and intelligent waiver of the statement made on the previous day to a non-investigating officer that "I'd rather see an attorney"?

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OPINIONS BELOW

Petitioner, Eutues White, was convicted of murder by a jury on October 8, 1969 in the Circuit Court of St. Clair County, Illinois.

On direct appeal, the Appellate Court of Illinois remanded White's case for a hearing on the admissibility of his confession. People v. White, 10 Ill.App.3d 914, 295 N.E.2d 300 (5th Dist.1973). The trial court held the hearing, found the confession voluntary and admissable, and entered a new judgment of conviction on July 27, 1973. The Appellate Court affirmed the judgment, People v. White, 22 Ill.App.3d 180, 317 N.E.2d 323 (5th Dist. 1974), as did the Illinois Supreme Court, People v. White, 61 Ill.2d 288, 335 N.E.2d 457 (1975). Certiorari was denied, White v. Illinois, 424 U.S. 970 (1976).

Subsequently, White filed a petition for a writ of habeas corpus, claiming that his conviction had been obtained by the use of a coerced confession in violation of the Fifth and Sixth Amendments. The United States District Court for the Southern District denied the petition. On appeal, the United States Court of Appeals for the Seventh Circuit reversed and remanded for an evidentiary hearing to determine if White requested counsel while in custody, if White waived the request for counsel, if the police officers acted in good faith in obtaining White's confession, and if the reasoning of Stone v. Powell, 428 U.S.465 (1976), precluded federal habeas corpus relief. White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978). The evidentiary hearing was held, the District Court found that White made no clear or unequivocal request for counsel, and the petition was again denied.

On the second appeal to the United States Court of Appeals for the Seventh Circuit, the Court of Appeals held that White requested counsel, that there was no per se rule preventing the waiver of that request for counsel, and that White knowingly and voluntarily waived his request for counsel. White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979). A petition for rehearing and suggestion for rehearing en banc was denied.

STATEMENT OF THE CASE

On November 27, 1968, Bruce Reinheimer was abducted, robbed, and shot in the head. (T 24) On May 24, 1969, Petitioner, Eutues White, was arrested for a crime unrelated to the Reinheimer murder. (R 24) After White's arrest, he was taken to the East St. Louis Police Station. The facts directly bearing on White's request for counsel occurred while he was in custody on May 24, May 25, and May 26, 1969.

On May 24, 1969, White was taken from his cell to see Captain William Johnson. The testimony of both Captain Johnson and White established that the meeting was very short, that the purpose was to ascertain if Captain Johnson knew White, that no interrogation of White by Captain Johnson occurred, and that White was subsequently returned to his cell. (S 11-12; RR 27-28)

Captain Johnson was not called as a witness at the trial in 1969. At the suppression hearing in 1973, Captain Johnson stated that White "didn't want to talk ... he would rather see a lawyer". (RR 24) Captain Johnson clearly indicated that White did not want to talk to him and that his right to remain silent was understood and honored. (RR 24, 31-32) Captain Johnson also clearly indicated that White was never refused the opportunity to call an attorney or to have one appointed. (RR 28) At the evidentiary hearing in 1979, Captain Johnson testified that his testimony at the suppression hearing in 1973 was true and correct, but that he no longer had any independent or refreshed recollection of the meeting. (S 24)

White was not asked specifically about his conversation with Captain Johnson at the trial in 1969. White did testify that he did not remember events during his confinement. He stated that he did not remember being questioned, or even being in jail during the month of May. (T 142) At the suppression hearing in 1973, White declined to testify after Captain Johnson was called as a witness (RR 30) and after Captain Johnson was recalled as a witness (RR 35). At the evidentiary hearing in 1979, White testified:

"I was down here to see a lawyer" (S 12), "I want to see an attorney" (S 18), and "I'd rather see an attorney" (S 19). When specifically asked by the Court if there was some particular attorney he wanted to talk to or just any attorney, White replied, "Well, I didn't want to talk to him (Johnson)". (S 18)

On May 25, 1969, White was questioned by Officer Cornelius O'Sullivan and Officer William Stanis. Before questioning, White was advised of, appeared to understand, and waived his Miranda rights. (S 37-38; RR 7-8) He then confessed to crimes not relevant to the present petition.

On May 26, 1969, White confessed to the Reinheimer murder, and he reinacted the crime. The repeated testimony of Officers Stanis and O'Sullivan concerning this confession was that White was advised of his Constituitonal rights according to the Miranda standards, that he understood them, and that he waived them. (RR 3-4; T 51; RR 11, 19-20; S 40, 47) When specifically questioned as to White's response when told he had the right to have an attorney present, Officer O'Sullivan (R 13; S 49) and Officer Stanis (T 71) both stated, "He said he didn't need one". The confession itself is signed on both pages and contains a signed waiver of the Miranda rights. (Exhibits 1 and 2 following T 55) Also, both officers stated that no coercion or inducement was used to obtain the confession (R 5; T52), and that White read the statement aloud before signing it (R 5, 12; S 47).

REASONS FOR DENYING CERTIORARI

I. THE FINDING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT THAT IN CERTAIN INSTANCES A PERSON IN CUSTODY WHO HAS PREVIOUSLY REQUESTED COUNSEL MAY KNOWINGLY AND VOLUNTARILY WAIVE COUNSEL IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT AND IS IN ACCORD WITH THE OTHER CIRCUIT COURTS OF APPEAL

The Court of Appeals for the Seventh Circuit found that Petitoner, Eutues White, made a request for counsel, but that that request was subsequently waived. Petitoner's first contention is that there is a per se rule prohibiting such a post-request waiver. Petitoner looks to Miranda v. Arizona, 384 U.S. 436 (1966), Michigan v. Mosley, 432 U.S. 96 (1975), and Fare v. Michael C., ___ U.S. ___, 99 S.Ct. 3560, 61 L.Ed.2d 197 (1979), to support this contention.

It is possible to argue that the per se rule desired by Petitioner was created when the Miranda Court commented that "(i)f the individual states that he wants an attorney, the interrogation must cease until an attorney is present". 384 U.S. at 474. However, such an argument ignores the numerous Miranda passages dealing with waiver, 384 U.S. at 444, 470, 475, 476, 479, and ignores the thrust of Mosley, Fare, and North Carolina v. Butler, ___ U.S. ___, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Mosley rejected a literal interpretation of a comment in the same paragraph of Miranda that "(i)f the individual indicates ... he wishes to remain silent, the interrogation must cease ... any statement taken after the person invokes his privilege cannot be other than the product of compulsion". 384 U.S. at 474. Not only did this Court find that that passage did not create a per se rule prohibiting a waiver after a previous request to remain silent, this Court also rejected the entire literal interpretation approach because it would lead to absurd and unintended results, because it would create irrational obstacles to legitimate police investigation, and because it would deprive a suspect of an opportunity to make an informed and intelligent assessment of his

interests. 423 U.S. at 102. The Court of Appeals correctly interpreted the message of Mosley to be that Miranda procedures are flexible and not controlled by one isolated passage in that decision.

While Fare was not specifically discussed by the Court of Appeals, the Fare holding reinforces the statement in the opinion that the proper waiver analysis depends on the totality of the circumstances. Fare reversed the California Supreme Court because it rejected a totality of the circumstances inquiry. 99 S.Ct. at 2566, 61 L.Ed.2d at 204. It was found that a totality of the circumstances analysis was adequate to determine if there had been a waiver and that a totality of the circumstances analysis prevented inposing rigid restraints.

> (T)he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. 99 S.Ct. at 2571-2572, 61 L.Ed. 2d at 212.

It should also be noted that the so called per se rule of Fare is that "an accused's request for an attorney is per se an invocation of his Fifth Amendment rights". 99 S.Ct. at 2569, 61 L.Ed.2d at 209. Rather than mitigate against a possible waiver of counsel, it can just as well be urged that his passage means that a request for counsel can be waived under the Mosley criteria for waiver of Fifth Amendment rights.

Butler is perhaps the most analogous case because it directly presents a waiver of counsel question, although an initial rather than a post-request waiver of counsel question. Butler held that an explicit statement of waiver is not invariably necessary to support a finding that a defendant waived the right to remain silent or the right to counsel guaranteed by Miranda. 99 S.Ct. at 1758-1759, 60 L.Ed.2d at 293-294.

> Even when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on the particular facts and circumstances surrounding that case ... (w)e see no reason to discard that standard and replace it with an inflexible per se rule in a case such as this. 99 S.Ct. at 1758, 60 L.Ed.2d at 293.

Both the Butler decision and the opinion of the Court of Appeals recognized that the real purpose of Miranda was to permit a full exercise of one's Constitutional privileges.

While there is no opinion by this Court exactly holding that there is no per se rule prohibiting a post-request waiver of counsel, Mosley held that there was no per se rule prohibiting a post-request waiver of silence, and Butler held that there was no per se rule prohibiting an initial waiver of counsel. It appears that the Court of Appeals correctly chose to eschew the per se rule approach and instead to adopt a case-by-case analysis.

The Seventh Circuit is not alone in rejecting a per se rule prohibition of post-request waivers of counsel. The cases cited by Petitioner do not support the assertion that the Circuit Court of Appeal are in a state of confusion. In fact, the decision of the Seventh Circuit is in conformity with the majority of other Circuit Court of Appeal. United States v. Monti, 557 F.2d 899 (1st Cir. 1977); Wilson v. Henderson, 584 F.2d 1185 (2nd Cir. 1978), cert. denied 99 S.Ct. 2892 (1979); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied 432 U.S. 908 (1977); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), cert. denied 100 S.Ct. 485 (1980); United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978), cert. denied 99 S.Ct. 2170 (1979); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), cert. denied 98 S.Ct. 2266 (1978).

It should also be noted that the White decision does not represent a reversal of the Seventh Circuit position in United States ex rel. Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972). The warnings given in that case were defective. Thus, there was never the known right necessary for a finding of waiver.

II. THE FINDING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT THAT PETITIONER WHITE WAIVED HIS PREVIOUS REQUEST FOR COUNSEL IS CONSISTENT WITH THE DEFINITION OF WAIVER AND WITH THE FACTS OF THE CASE

The Court of Appeals for the Seventh Circuit found that Petitioner, Eutues White, made a request for counsel, but that that request was subsequently waived. Petitioner's second contention is that the facts of this case do not support the finding of a waiver.

Consistent with the previously discussed cases, the Court of Appeals used the established standard of waiver found in Johnson v. Zerbst, 304 U.S. 458 (1938). A waiver is an intentional relinguishment or abandonment of a known right or pivilege. 304 U.S. at 464.

The record supports the finding that the right to counsel was known by Petitioner. Petitioner received full and complete Miranda warnings on May 24, May 25, May 26, 1969, and Petitioner read these rights aloud before signing a waiver of them. (R 5,12; S 47) While Petitioner did receive a score of 79 on a vocabulary baued test, the examing doctors also found that Petitoner was alert, gave information in a well organized manner, and that he had the capacity to understand the charges and aid in his own defense. (C 7) It should also be noted that Petitioner was familiar with legal procedures and police questioning as he had been arrested on numerous prior occasions. The Court of Appeals followed its established approach to I.Q. test, United States ex rel. Cooper v. Warden, Illinois State Penitentiary, 566 F.2d 28 (7th Cir. 1977), and properly relied on Petitioner's entire background, experience, and conduct.

The record supports the finding the Petitioner intentionally abandoned his right to counsel. Petitioner was not interrogated on May 24, 1969, following his "off-hand" comment that he would "rather see an attorney". (S 11-12; RR 27-28) Petitioner demonstrated no desire to follow-up on this comment. When advised of

his right to an attorney on May 25 and May 26, 1969, there is uncontradicted testimony that Petitioner stated that, "I don't need one". (T 71; R 13; S 49) It should also be noted that Petitioner never testified to even requesting counsel until the evidentiary hearing held in the District Court ten years later. There is no evidence in the record of coercion, trickery, harassment, or any reprehensible police conduct that should be curbed, or that conflicts with the finding of a near explicit waiver.

CONCLUSION

For the aforementioned reasons, the respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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NOTICE

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PLEASE TAKE NOTICE that on July 15, 1980, we mailed the original and one copy of the attached Brief In Opposition To Petition For Writ of Certiorari in the above entitled cause to the Clerk of the United States Supreme Court, copies of which are hereby served on you.

Kathleen M. Lien
Assistant Attorney General

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The undersigned being first duly sworn on oath deposes and states that a copy of the above Notice and Brief was served upon the above named parties on July 15, 1980 by depositing such copy in the United States mail.

Kathleen M. Lien

SUBSCRIBED and SWORN to
before me this 15th day
of July, 1980.

Teresa M. Garman

NOTARY PUBLIC